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Supreme Court, U.S.
FILED
NOV 3 1997
CLERK

No. 96-1400

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF CALIFORNIA AND
STATE LANDS COMMISSION, PETITIONERS

v.

DEEP SEA RESEARCH, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS IN PART

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1. a. Petitioners argue (Pet. Br. 17-29) that the mere claim of title *by* the State to the shipwreck located by respondent Deep Sea Research, Inc., required this *in rem* action to be dismissed as a suit *against* the State within the meaning of the Eleventh Amendment. That sweeping theory of immunity, which invokes the Eleventh Amendment as a sword and not a shield, should be rejected. Under long-standing precedent, petitioners are not entitled to immunity at this threshold stage of the case because the vessel is not within the actual possession and control of the State.

Petitioners err in asserting that this Court's cases support its position that the Eleventh Amendment automatically bars a suit "when the proceeding is one *in*

rem against property claimed by a State." Pet. Br. 19.[1] Petitioners contend (*ibid.*) that the case "closest in point" is *Ex parte New York*, 256 U.S. 503 (1921) (*New York II*). As we point out in our opening brief (U.S. Br. 22-23), however, *New York II* is quite different from this case. *New York II* involved a maritime tort action in which money damages were sought as the remedy, not an

[1] Petitioners cite (Pet. Br. 19) *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 38 (1992), for the proposition that "there is no general *in rem* exception to the sovereign immunity bar against monetary recovery." But *Nordic Village* was not a case in which property not within the possession and control of a sovereign was brought within the jurisdiction of the federal court by another party, and the sovereign then intervened to file a claim to the property. In *Nordic Village*, the trustee filed an adversary proceeding against the United States in an effort to recover for the bankruptcy estate money that was in the federal treasury. Accordingly, although the administration of claims to property in the estate are similar to an *in rem* proceeding, monetary claims by the trustee against third parties are not; they are independent actions of a traditional common law nature. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 43-49 (1989). The claims brought by the trustee against the state agencies in *Hoffman* v. *Connecticut Department of Income Maintenance*, 492 U.S. 96, 101 (1989) (plurality opinion), which the Court found to be barred by sovereign immunity, were similar to those in *Nordic Village*.

Neither *Nordic Village* nor *Hoffman* suggests that, if a State files a claim to property in the bankruptcy estate, the court must either dismiss the action on immunity grounds (which would prevent adjudication of the State's own claim) or proceed to resolve the case without discharging the debt owed to the State. To the contrary, both *Nordic Village* and *Hoffman* indicate that, if the United States or a State does not file a claim against the estate, the debts allegedly owed to either will be discharged and the bankruptcy decree will be good as against all the world. See *Nordic Village*, 503 U.S. at 35-36; *Hoffman*, 492 U.S. at 102-103 (plurality opinion). That approach directly parallels the proper approach in admiralty cases. If the State files a claim to a vessel or other property not within its actual possession and control, its claim will be adjudicated along with those of all other claimants; but if the State does not file a claim, it will be lost.

action to determine title to a vessel. The tort action was brought in the form of an *in rem* proceeding to avoid naming the State as a defendant in an *in personam* action, which clearly would have been barred by the Eleventh Amendment. See U.S. Br. 23. Moreover, *New York II* turned on whether the vessel could be attached, and the Court explained that general principles of maritime law prohibit attachment of a public vessel. See 256 U.S. at 510-511. The Court did not rest its decision on the Eleventh Amendment. Thus, petitioners are wrong in contending that "[t]he only material difference between that case and this is that here, the State's claim is disputed, whereas there it was not." Pet. Br. 19.

Petitioners further argue that the present action is essentially against the State because "[respondent] knew that the wreck lay on the State's submerged lands and that the State claimed title, its predecessor corporation having previously applied to the [State Lands] Commission for a salvage permit." Pet. Br. 21 (citing J.A. 108). The fact that an admiralty *in rem* action may be against property to which a sovereign could be expected to file a claim does not automatically give rise to immunity from suit. Thus, in *The Davis*, 77 U.S. (10 Wall.) 15 (1869), there was no doubt of the United States' ownership of cotton that was the subject of a salvage claim. This Court denied the United States' assertion of immunity, however, because the federal agents were not in actual possession of the cotton and, as a result, "the possession of the United States [did not have to be] invaded under process of the court." *Id.* at 20. See also *Compania Espanola de Navegacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68 (1938) (foreign government); *United States* v. *Peters*, 9 U.S. (5 Cranch) 115 (1809) (State). See generally U.S. Br. 24-29 (discussing cases).

Petitioners overstate their case when they assert that, because the *Brother Jonathan* was found on submerged

lands conveyed to the State by the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, the same sovereign interests are implicated here as in cases involving title to the submerged lands themselves. The Submerged Lands Act expressly retains in the United States the "powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs," 43 U.S.C. 1314(a). Those powers surely extend to sunken ships that once were used in navigation and commerce, even when the ships happen to be found on state-owned submerged lands. Cf. *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). And those same powers are retained by the United States in the Abandoned Shipwreck Act of 1987 (ASA). See 43 U.S.C. 2105(e) (incorporating 43 U.S.C. 1314). Thus, this case does not implicate the type of sovereign interests at issue in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997).

Petitioners also overstate the impact of the proceedings below in asserting that the district court's preliminary determination that the *Brother Jonathan* was not "abandoned" within the meaning of the ASA "prevent[ed] California from exercising even its *regulatory* authority over [respondent's] salvage of the vessel," Pet. Br. 22, and that "[t]he orders issued by the district court in this case amount to nothing less than a usurpation of one of the most important attributes of California's sovereignty—the management and control of its sovereign lands," Pet. Br. 28. As we explain in our opening brief (U.S. Br. 42-43), the question of a State's title to a shipwreck is distinct from whether it may exercise regulatory authority over salvage operations that occur on submerged lands owned by the State. Petitioners raised no issue on appeal concerning the particulars of the district court's order allowing respondent to proceed with salvage operations. They did not argue, for example,

that, because the State owns the submerged lands on which the vessel was found, the court should have ordered respondent to apply for a state permit or comply with state standards in conducting salvage operations, as a matter of either law or comity. Rather, petitioners appealed solely on whether the district court had correctly adjudicated their immunity based on the State's claim to "ownership" of the shipwreck. See Pet. C.A. Br. 1.[2]

Finally, petitioners' extended discussion (Pet. Br. 22-27) of the "colorable claim" language in *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982), reveals a misunderstanding of the relevant principles on which this Court has based its immunity doctrine. Petitioners have cited no authority from this Court for

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[2] Petitioners complain that "the district court has allowed [respondent] to commence salvage of the *Brother Jonathan*" without procurement from the State of any "lease or permit." Pet. Br. 29. That issue, however, is distinct from the issues on which this Court granted certiorari. Properly framed, that objection by petitioners goes to whether an admiralty *in rem* court may permit salvage operations in a manner inconsistent with state regulation of its submerged lands and activities occurring on them. That question of regulatory authority does not affect whether a State may invoke the Eleventh Amendment in an *in rem* action brought to determine *title* to the shipwreck. How the district court should proceed with respect to the manner of salvage, even if the State does *not* have title to the shipwreck, is more appropriately addressed by that court in the course of further proceedings. We assume that the district court, at the very least, would have authority to take state law standards into account in fashioning parameters for respondent's salvage operations, if they are permitted to continue. In any event, nothing in the order cited by petitioners (Pet. Br. 29 (citing J.A. 299-300)) exempts respondent from complying with any state regulation that might otherwise be applicable; it merely enjoins "competing salvors, would-be salvors, or divers, * * * from interfering with [respondent's] efforts to recover artifacts from the *Brother Jonathan*." J.A. 300. See also J.A. 217 (recognizing that how salvor "enjoy[s] * * * title [to the shipwreck] might be subject to reasonable state regulation as to environmental needs").

the principle that a State not in possession of a vessel is entitled to immunity in an admiralty *in rem* action merely by asserting title. See U.S. Br. 26 & n.19.

b. In certain respects, respondent's Eleventh Amendment argument also misstates applicable law and the record in this case. First, respondent contends that a court's "*duty* to determine [its] own jurisdiction" compelled the district court to "hear such evidence as may be necessary to decide the jurisdictional facts—even if the jurisdictional facts touch upon the merits." Resp. Br. 21. In respondent's view, that principle required the district court to resolve the State's claim of title under the ASA on the merits in deciding the threshold question of the court's jurisdiction. That analysis is misguided.

As the cases cited in our opening brief make clear (U.S. Br. 27-29), when a sovereign asserts title to a vessel in its actual possession, this Court's precedents do not permit the *in rem* court to entertain factual presentations to challenge a sovereign's title unless the conclusion that the sovereign has wrongfully obtained the vessel is established beyond a reasonable doubt. See, *e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822). Of course, in such a case, the court may examine whether the vessel is, in fact, within the sovereign's actual possession and control, although formal representations to that effect by the representatives of the sovereign are entitled to respect. See U.S. Br. 22-23, 27-28. But here, petitioners made no such showing of actual possession and control. Petitioners' invocation of the Eleventh Amendment should have been rejected by the courts below on that ground alone. The courts bypassed that threshold determination and proceeded to address, at least in a tentative way, petitioners' claim of title under the ASA, on the assumption that, if the State established that it had actually obtained title under the ASA, the suit should be dismissed on Eleventh Amendment grounds. That issue, however,

merges into the very merits of the *in rem* action, and ordinarily would not be resolved until the State (like any other party) filed a claim to the vessel or its cargo, which petitioners have thus far not formally done.

Second, respondent asserts (Resp. Br. 30-31) that "the District Judge found that Petitioners had completely failed to make any meaningful showing on the essential, threshold issues of abandonment and embeddedness" with respect to their ASA claim, and consequently that "Petitioners could lay no claim to the property." The proceedings below show something different. In ruling on petitioners' motion to dismiss, the district court decided that, based on the state of the record as it existed at the time and its understanding of the applicable law, petitioners had not made out a claim of immunity. The district court has not yet entered a final decree concerning ownership of the *Brother Jonathan* and its cargo, and the court expressly "reserve[d] judgment" on such issues as the amount of "salvor's fees, or title to or distribution of any artifacts recovered from the wreck." Pet. App. A61.[3]

c. The rule of immunity that applies in this case does not accord a State immunity from suit in federal court

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[3] Respondent maintains (Resp. Br. 36) that, "[b]ecause the ASA is silent on the question of which court—state or federal—is to decide whether any given shipwreck meets the ASA criteria, and because that determination affects important federal interests, it must be presumed that Congress intended for that determination to be made by the federal courts." The ASA, however, cannot abrogate a State's immunity from suit where immunity otherwise exists, see *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114 (1996), and nothing in the ASA purports to do so, see *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 240 (1985). By the same token, because the ASA was enacted against the background of established admiralty and immunity law, the usual principles—under which petitioners' threshold claim of immunity must fail—are as applicable in cases in which a State or the United States bases its claim on the ASA as when its claim of title rests on some other ground.

under the Eleventh Amendment in an admiralty *in rem* action when title to the ship is disputed and the vessel is not in the actual possession of the State. When such a ship and its cargo are brought within the *in rem* jurisdiction of an admiralty court, a State must come forward and file its claim, just as the United States did in this case when it filed its claim to the gold believed to be on the *Brother Jonathan*. That rule derives from nearly two centuries of this Court's cases involving assertions of immunity in admiralty *in rem* actions; it is consistent with the text of the Eleventh Amendment and the purposes of avoiding judicial interference with a sovereign's possession of property; and it accords with one of the long-standing purposes underlying an admiralty court's *in rem* jurisdiction, to decide the ownership interests in a vessel as against "the whole world." *The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815). This Court's cases have evenhandedly applied that principle against assertions of sovereign immunity by States, the United States, and foreign sovereigns, see U.S. Br. 20-29 (collecting cases), and there is no reason to depart from it in this case.

2. Although we agree with respondent that petitioners are not entitled to Eleventh Amendment immunity in this case, we agree with petitioners that the court of appeals applied the wrong analysis in determining the validity of any claim by petitioners that the *Brother Jonathan* is an "abandoned shipwreck" within the meaning of the ASA. Respondent's arguments essentially pose three distinct questions for this Court to resolve: (1) whether an inference of abandonment may be drawn in the absence of evidence of affirmative intent by the owner to abandon the property; (2) whether the assertion of ownership to unspecified cargo now recoverable through technologically available means can overcome an inference of abandonment arising from the passage of time and inaction of the owners; and (3) whether,

if some property onboard the shipwreck is in fact unabandoned, the whole shipwreck should be deemed unabandoned, so that the provisions of the ASA do not apply at all.

a. Respondent incorrectly asserts (Resp. Br. 46) that the parties disagree only on the application of law to facts, and not on the proper legal standard. Respondent itself offers several different, and mutually inconsistent, definitions of abandonment. See *id.* at 42-43.[4] Yet nowhere in its brief does respondent cite the text, structure, purposes, or legislative history of the ASA to sup-

[4] At one point, respondent offers a definition that essentially requires express renunciation of title by the owner: "[T]he property will be deemed not to have been abandoned in the absence of evidence indicating that the owner intended to relinquish ownership." Resp. Br. 42. The two cases cited, however, are inapposite because neither involved an alleged "abandonment" for more than a very brief period of time and, in both cases, the property was recovered before the original owner had any opportunity to mount a recovery operation. See *The Akaba*, 54 F. 197 (4th Cir. 1893) (nonabandonment found for wire-towing hawser left at sea during storm and recovered by passing ship); *Wilkie* v. *Two Hundred and Five Boxes of Sugar*, 29 F. Cas. 1247 (D.S.C. 1796) (No. 17,662) (crippled ship held not abandoned when recovered by passing ship). Elsewhere, respondent appears to recognize that proof of actual intent is not necessary, and that inferences may be drawn from "the passage of time and the owner's failure to make any effort to recover the vessel." Resp. Br. 43. Respondent asserts that a different standard applies when the recovered property is brought into the jurisdiction of the court. In that instance, respondent acknowledges, when "the original owner fails to appear and assert a claim, the property will be deemed abandoned without any further proof on the issue." *Ibid*. We of course agree with respondent that abandonment may properly be found in that situation, and that principle may well be sufficient to resolve this case if no other claimants come forward in further proceedings in the district court. But it does not follow that an inference of abandonment may not also be drawn from the passage of time and failure to act where, after more than a century of inaction, the owner waits until the property is recovered and then asserts a claim.

port its contention that Congress intended to adopt a restrictive definition of abandonment.[5] As we explain in our opening brief (U.S. Br. 34-39), Congress intended abandonment to be construed liberally to meet the purposes of the ASA. See U.S. Br. 35; H.R. Rep. No. 514, 100th Cong., 2d Sess. Pt. 1, at 2 (1988); *id.* Pt. 2, at 5. It is consistent with that intent, therefore, for a court to presume abandonment where the owner has not come forward to claim the vessel and a long period of time has elapsed since the shipwreck occurred.[6] Moreover, it is reasonable to conclude that Congress intended to adopt

[5] The only three references to legislative materials are for other propositions. See Resp. Br. 42, 45, 46 n.17. The proposed formulations by respondent's amici are similarly devoid of persuasive analysis of congressional intent, and should be rejected. See Atlantic Mutual Insurance Co., et al., Amici Br. 18; Salvors, Inc., et al., Amici Br. 25; Columbus-America Discovery Group, et al., Amici Br. 15. Indeed, the amici Insurance Companies' contention that there should be a "strong presumption against abandonment" (Br. 23) directly conflicts with Congress's intent (see U.S. Br. 34-36).

[6] Respondent suggests that a Just Compensation Clause concern would arise if abandonment was inferred from a long passage of time in which no one came forward to claim property, but then a putative owner made a belated appearance. Resp. Br. 46 n.17. The Court need not decide that question here, because the owners of the vessel and of most of its cargo thus far have not come forward to claim their property and the district court has not ruled on any such claims. See Pet. App. A61. The district court's order makes clear that it was not finally deciding questions of title, and the traditional admiralty practice enables any claimant having title to assert it within "a year and a day after the institution" of the *in rem* arrest. *The Harrison*, 14 U.S. (1 Wheat.) 298, 299 (1816). Moreover, if we assume, *arguendo*, that respondent is correct that notice to the public is required for abandoned shipwrecks other than historic ones under 43 U.S.C. 2105(b) (see Resp. Br. 43 n.13, 46 n.17), in this case respondent overlooks the public listing in the *Federal Register* of the *Brother Jonathan* on the National Register of Historic Places, see 60 Fed. Reg. 47,589 (1995), as well as numerous court filings and public orders in this case.

the majority view of abandonment in admiralty law, under which a court may draw an inference of abandonment from an owner's inaction over a prolonged period of time and the owner's failure to make any attempt to recover the property or otherwise maintain an ownership interest in it. Respondent's definition excuses complete inaction by a property owner, so long as the owner later comes forward in an *in rem* action and asserts a claim even to unspecified property.

b. In accepting respondent's contention that an owner never needs to demonstrate a continuing ownership claim between the time of loss and the time of notice in an *in rem* proceeding, the courts below imported into the ASA the notion that technological advances can serve to negate an inference that otherwise would be drawn from an owner's inaction. Absent any other affirmative indications that the owner is continuing to preserve its title to the shipwrecked vessel or cargo, however, the lack of technological means of recovery would appear to reinforce the inference of abandonment. In enacting the ASA, Congress was well aware that "new technologies have allowed the recovery of wrecks that have been lost for long periods of time," but its concern was not with the traditional admiralty policy of salvaging that property "so that the goods can be returned to commerce." S. Rep. No. 241, 100th Cong., 1st Sess. 6 (1987). See also H.R. Rep. No. 514, *supra*, Pt. 2, at 8 (admiralty law of salvage and finds is "not well-suited to the preservation of historic and other shipwrecks to which this Act applies"). Rather, Congress concluded, "[t]he arch[a]eological and recreational interests require that certain shipwrecks be managed by [federal and state governments, which have] experience in these areas and a broad concern with historic and recreational resources as well as an awareness of the unique needs of their local resources." S. Rep. No. 241, *supra*, at 6. It would be di-

rectly contrary to Congress's intent in drafting the ASA to give a special significance to technological developments in interpreting the word "abandoned" in a way that authorized "admiralty courts to adjudicate these interests based on traditional admiralty concerns." *Ibid.*

c. Respondent's reliance on technological advances in opposing petitioners' claim of abandonment is especially misplaced in the circumstances of this case. As subrogee of cargo said to have been insured aboard the *Brother Jonathan*, respondent cannot specify what that cargo was or demonstrate that the insurance companies whose claims it purchased ever evidenced any continuing interest in recovery of the property after it was lost in 1865.[7] Given that the cargo aboard the *Brother Jonathan* was varied—ranging from self-insured Wells Fargo property, to a U.S. Army payroll, to camels—respondent cannot meet its burden of demonstrating ownership of *anything*

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[7] The "proof" offered by respondent is unpersuasive in definitively establishing nonabandonment. First, respondent's officer used newspaper articles to identify insurance companies that were said to have insured cargo aboard the *Brother Jonathan*. See J.A. 138-139 (declaration of David Flohr). After locating such of those companies as still exist, respondent was apparently unable to obtain any direct evidence that those companies in fact insured any particular item of cargo. As a result, respondent's subrogated property right is to unknown articles. J.A. 139-140. Not knowing what, if anything, they had in fact insured, those companies merely conveyed to respondent whatever rights they may have had in cargo aboard the *Brother Jonathan*. See J.A. 149. General subrogation principles would vest in respondent only the ownership rights that the insurance companies actually held by payment of claims, and not rights in any property on which no claims were paid. See 6 S. Sorkin, *Goods in Transit* § 49.02[2][c] (1997). Respondent has offered no evidence that those insurance companies undertook any salvage efforts (or otherwise asserted a continuing claim to items of cargo) between the time of alleged payment of claims and the discovery of the *Brother Jonathan* in 1993. (Our opening brief incorrectly gives the date of actual discovery as 1991. See U.S. Br. 9.)

in particular that is non-perishable and warrants its salvage effort after 130 years under water.

Indeed, the failure by respondent as subrogee to specify with particularity the property it purports to claim raises serious questions about whether that property can properly be thought of as unabandoned. As this Court has made clear, a claimant in an *in rem* action must state with particularity the property being claimed; otherwise, the property is treated the same as abandoned property:

> The goods were owned by a number of persons, in several and distinct rights; and a general claim and answer was interposed in behalf of all of them by [two cargo owners], without naming who in particular the owners were, or distinguishing their separate proprietary interests. This proceeding was doubtless irregular in both respects. [The two owners] had no authority, merely as co-shippers, to interpose any claim for other shippers with whom they had no privity of interest or consignment; and several claims should have been interposed by the several owners, or by other persons authorized to act for them in the premises, each intervening, *in his own name, for his proprietary interest, and specifying it. If any owner should not appear to claim any particular parcel of the property*, the habit of courts of admiralty is, to retain such property, or its proceeds, after deducting the salvage, until a claim is made, or a year and a day have elapsed from the time of the institution of the proceedings.

Stratton v. *Jarvis*, 33 U.S. (8 Pet.) 4, 8-9 (1834) (emphasis added). Under those principles, and based on the evidence in the record at the time the district court ruled on the State's motion to dismiss, there was no basis for finding that the subrogated interests asserted by

respondent to unspecified items of cargo were not "abandoned" within the meaning of the ASA.

d. Irrespective of the ultimate disposition of the cargo just discussed, the present record provides little cause to doubt that the vessel itself and two-thirds of its cargo should be regarded as abandoned. See Resp. Br. 49 (conceding that the district court found only one-third of the *Brother Jonathan*'s cargo to be subject to ownership claims by respondent and the United States); Pet. Br. 33 (describing evidence that the vessel itself has been abandoned). Thus, should the Court conclude that the (unspecified) property claimed by respondent has not been abandoned, reversal is still warranted because respondent draws the wrong legal conclusion from the presence of some unabandoned property in an otherwise abandoned shipwreck. Like the court of appeals, respondent errs in asserting that the existence of some claims to unabandoned property "justif[y] a finding that the wreck as a whole is not abandoned." *Ibid.*[8]

Respondent does not address the three reasons given in our opening brief why the court of appeals erroneously construed the ASA to require total abandonment before the Act applies to any portion of a shipwreck. See Resp. Br. 49-50.[9] First, nothing in the definition of "ship-

[8] Respondent misreads our brief when it cites the claim made by the United States in the court below as taking a different position on abandonment than the one we now take. See Resp. Br. 44 & n.15. Our position, consistently taken throughout this litigation, is that property of the United States is not abandoned absent an express renunciation of ownership. We disagree with respondent, however, that Congress intended for the existence of some United States government property (or other unabandoned property) aboard an otherwise abandoned shipwreck to defeat the operation of the ASA, even with respect to portions of the shipwreck that *are* abandoned.

[9] Respondent's contention (Resp. Br. 49) that other claimants may eventually come forward to claim cargo aboard the *Brother Jonathan*

wreck" in the ASA forecloses a partial abandonment. See U.S. Br. 41 (discussing 43 U.S.C. 2102(d)). Second, the unified *res* theory of abandonment negates Congress's intent of having the States and Federal Government manage abandoned shipwreck sites: "The States and the Federal Government, both of which have extensive experience in recreational and historic site management as well as broad interests in a range of other historic and recreational resources, should manage the shipwrecks covered by this Act." S. Rep. No. 241, *supra*, at 7. In shipwrecks with substantial abandoned property (especially where the vessel itself is abandoned), it is reasonable to conclude that Congress intended the States to play a key role in the management of the site. Third, recognition of state ownership of abandoned portions of the shipwreck pursuant to the ASA creates no necessary conflict with continuing admiralty jurisdiction over the

(and perhaps even the *Brother Jonathan* itself) furnishes no reason for the courts to ignore that the present state of the record demonstrates abandonment of at least the vessel and most of its cargo and that the shipwreck has been listed on the National Register of Historic Places. (Because of the listing on the National Register, respondent's argument that the district court properly found the shipwreck not to be embedded (*ibid.*) now has no bearing on whether the ASA applies. See U.S. Br. 12 n.12.) Accordingly, pending a final judgment resolving all competing claims, the district court should not allow salvage operations to continue in a manner that is inconsistent with the manifest preference of the State, which appears as of now to be the owner, to leave any abandoned portions of the shipwreck in place. Respondent takes inconsistent positions in arguing that it is appropriate to consider a later claim of ownership but not a subsequent listing of the *Brother Jonathan* on the National Register (see Resp. Br. 13 n.6), since such a listing is an element of the State's claim of ownership. Nor, contrary to respondent's understanding (*id.* at 50), is an *in rem* action procedurally inconsistent with a partial abandonment theory, because the *in rem* decree can readily acknowledge the State's ownership of abandoned portions of a shipwreck by operation of the ASA while decreeing title in others with respect to unabandoned property.

unabandoned portions, because the ASA itself contemplates that the States that acquire title to shipwrecks will develop policies to "allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites." 43 U.S.C. 2103(a)(2)(C).

Thus, a finding of partial abandonment (with the State acquiring title to abandoned property that otherwise qualifies under the ASA) is consistent both with the law of salvage, which recognizes the rights of competing claimants, and with the "right of access" provision of the ASA, 43 U.S.C. 2103(a)(2)(C). Under a proper balancing of competing interests, the owner of a small portion of unabandoned property aboard a shipwreck should not be permitted to frustrate the purposes of the ASA by exercising a veto over whether other portions of the wreck are considered "abandoned" within the meaning of that Act.

Consequently, although the court of appeals properly upheld the district court's denial of petitioners' immunity under the Eleventh Amendment, it erred in rejecting their contention that the ASA applies to the *Brother Jonathan*. Even though it is uncontroverted that some cargo from the *Brother Jonathan* is unabandoned (*i.e.*, the United States' property), the evidence in the record thus far supports an inference that the vessel itself and the rest of its cargo are abandoned. Thus, in the absence of any further evidentiary development, under a proper application of the ASA, the district court should hold that the *Brother Jonathan* is an abandoned shipwreck subject to that Act's provisions with respect to the *Brother Jonathan* itself and any abandoned cargo it carried. Because the State would have title to that property, the court would not retain admiralty jurisdiction to render a salvage decree and to permit salvage operations

with respect to that property. The court's admiralty jurisdiction would extend only to property to which the State did not obtain title under the ASA. Any questions concerning the interplay of an admiralty court's traditional jurisdiction over salvage with respect to such property, and the State's interests deriving from its ownership of the remainder of the shipwreck and the submerged lands on which it is located, would properly be considered, if necessary, at that time.[10]

3. As we explain in our opening brief (U.S. Br. 46), the Court need not reach the question whether Section

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[10] As we have explained above, it is our position that, in a case such as this, a State's assertion of Eleventh Amendment immunity should be rejected at the outset if the State does not show that the shipwreck is within its actual possession and control. Because the district court may properly assume *in rem* jurisdiction at that point, the merits of the State's assertion that it has title to the shipwreck pursuant to the ASA would then be addressed by the court only if the State filed a claim in the *in rem* proceeding, just as any other claimant would do. If the court concluded that the State's claim of title to some or all of the shipwreck under the ASA was valid, the court presumably would then relinquish jurisdiction over the property to that extent (indeed the Eleventh Amendment may require that result once the State's title is finally adjudicated), although that relinquishment would not prevent the court from exercising jurisdiction over any salvage of the remainder of the shipwreck. In this case, however, the parties and the courts below addressed the State's assertion of title under the ASA at the threshold, in response to petitioners' motion to dismiss on Eleventh Amendment grounds. For that reason—and because dismissal on Eleventh Amendment grounds might then have been proper to the extent a final adjudication of the ASA claim was intended and petitioners established their title to particular portions of the shipwreck by a preponderance of the evidence—we believe it is appropriate for the Court to address the general operation of the ASA before remanding the case, even if the merits of a case such as this would not ordinarily be considered on an appeal from a denial of a motion to dismiss on Eleventh Amendment grounds under *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

6313 of the California Public Resources Code is preempted if it agrees with our submission that the courts below incorrectly construed the ASA, for in that event the district court should first finally resolve the State's claims to the *Brother Jonathan* and its cargo under the ASA. Even if the Court were to conclude that the State has not made out a sufficient basis to invoke the ASA in further proceedings in the district court, the appropriate disposition by this Court at this stage, in our view, is not to resolve in the abstract broad questions of whether and to what extent federal admiralty law principles preempt the state statute, as respondent urges (Resp. Br. 37-41). Rather, the Court should address only the narrower question actually resolved by the court below: whether Section 7(b) of the ASA, 43 U.S.C. 2106(b), is a preemption provision that of its own force dictates the invalidation of state law. As we have explained (U.S. Br. 46-49), it is not. With that error corrected, the case may then be remanded for further proceedings.

Respondent does not contest our position that Section 7(b) is not a preemption provision and that the court of appeals misread that section to mean that "[a]ll other shipwrecks continue to be subject to the exclusive admiralty jurisdiction of the federal courts." Pet. App. A8; U.S. Br. 48. Properly read, Section 7(b) is a savings clause designed to express Congress's intent not to alter existing law in any other respect: "This chapter does not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. 2106(b).

If, contrary to our submission above, the Court determines that the ASA does not apply to the *Brother Jonathan*, three distinct issues might arise on remand: (1) whether either admiralty law or federal statutory law preempts any provisions of Section 6313 of California Public Resources Code the State might invoke to assert

title to the *Brother Jonathan*; (2) whether federal law preempts the provisions of state law that purport to regulate the method of salvage of the shipwreck; and (3) whether other federal laws—such as historical preservation, submerged lands, and navigational laws[11]—displace or affect the operation of certain aspects of the admiralty law of salvage and finds in this setting. The ultimate application of admiralty law cannot be definitively resolved without analysis of the potentially complicated interplay among federal admiralty law, federal statutes, and state law. The court of appeals erred in simply assuming that the ASA itself requires a holding that admiralty law displaces the state law provisions that assert title to or regulatory authority over shipwrecks that do not meet the ASA's criteria. See Pet. App. A8.

Moreover, in this Court, petitioners do not address whether the take-title features of the state statute they

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[11] A number of federal statutes might have some bearing on the treatment of abandoned shipwrecks in various settings. See, *e.g.*, Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 409, 415 (authorizing removal by United States of obstructions to navigation); Submerged Lands Act, 43 U.S.C. 1301 *et seq.* (retaining navigational rights in United States notwithstanding conveyance of title to natural resources in submerged lands); National Historic Preservation Act, 16 U.S.C. 470 *et seq.* (requiring federal agencies to consider effects of federal undertakings on historic resources eligible for listing on the National Register); Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa *et seq.* (authorizing imposition of penalties for unauthorized removal, destruction, or injury to archaeological resources on lands owned by United States); Marine Protection, Research, and Sanctuaries Act of 1972, Tit. III, 16 U.S.C. 1431 *et seq.* (providing for management of historic sanctuary resources within national marine sanctuary); Antiquities Act of 1906, 16 U.S.C. 433 (authorizing sanctions against persons who damage or destroy heritage resources on lands owned or controlled by United States); Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.* (requiring coordination by federal agencies with States' coastal management plans, which include preservation of historic resources).

invoke are preempted by federal admiralty law or preserved by some other federal statutory law, but instead appear to defend the state statute only on the ground that state regulatory provisions are not preempted. See Pet. Br. 43-48. Conversely, respondent does not address the preemption issue with respect to the State's assertion of regulatory authority over the manner in which it conducts salvage, but rather asserts that the take-title provisions of the state statute conflict with federal admiralty law. See Resp. Br. 36-41.

The potential preemption issues raised in this case, therefore, are particularly complex. See, *e.g.*, *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994). Should it ultimately prove necessary to engage in preemption analysis in order to complete the adjudication of this case and provide for the salvage of any property that is finally found to be unabandoned, it is appropriate that such analysis be conducted in the first instance in the district court on remand, with appropriate attention given to the distinctive preemption issues potentially raised.

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Acting Solicitor General

NOVEMBER 1997